No. 122

In the Supreme Court of the United States

OCTOBER TERM, 1959

ARMANDO PIEMONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 1–4) is reported at 276 F. 2d 148.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1960. A petition for rehearing was denied on May 3, 1960. The petition for a writ of certiorari was filed on June 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was sufficiently apprised that, pursuant to the immunity statute (18 U.S.C. 1406), he

was required to answer questions he had theretofore refused to answer before the grand jury.

2. Whether the court's order to petitioner to answer questions was rendered invalid by the judge's oral statement that the court was granting immunity, where it was clear that the court was simply approving the procedure under 18 U.S.C. 1406 by which the Congress had authorized immunity in these circumstances.

3. Whether the court's written order to petitioner to answer questions was adequate.

4. Whether, after petitioner's refusal to answer certain questions despite the grant of immunity, the government was required to seek immunity for him with respect to further questions (not previously asked) before petitioner could be punished for refusing to answer the original questions.

STATUTE INVOLVED

18 U.S.C. 1406:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—
>
> (1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export

Act, as amended (21 U.S.C., sec. 174), or or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Seventh Circuit affirming the judgment of the District Court for the Northern District of Illinois which convicted petitioner of contempt for refusal to answer questions before a grand jury after an order under the statutory procedure for

immunity with respect to narcotics violations (R. 48).[1] A sentence of 18 months' imprisonment was imposed (R. 48).

On August 10, 1959, after consultation with counsel, petitioner refused on grounds of self-incrimination to answer questions before a federal grand jury investigating narcotics and marihuana offenses (R. 4–13). On August 13, 1959, the United States Attorney, with the approval of the Attorney General, presented a petition under 18 U.S.C. 1406, *supra*, pp. 2–3, requesting the district court to order petitioner to testify before the grand jury without the excuse of self-incrimination (R. 10–13, 15, 18). Government counsel filed with the court a transcript of the questions before the grand jury and the refusals to answer (R. 16). After a colloquy between government counsel and the court (discussed in the Argument, *infra*, pp. 7–9), the court found the petition in proper form, found petitioner to be a necessary and material witness, and informed petitioner that the court granted him immunity from prosecution which might arise from any answers that he would give the grand jury concerning the matter of their investigation (R. 18–19). Petitioner stated that he understood the court's order. On his request for time to confer with his counsel, the court deferred further grand jury proceedings until the next day (R. 19). By written order dated and docketed the same day, the court found that petitioner had properly asserted his constitutional privilege and ordered him to testify relative to the inquiry

[1] The designation "R." refers to the Appendix to Appellant's Brief in the court of appeals below, filed as the record herein.

of the grand jury involving violations of specified statutes, without excuse by reason of self-incrimination, "in accordance with Section 1406, Title 18, United States Code" (R. 14–15).

Upon his return before the grand jury on August 14, 1959, petitioner again refused to answer the questions theretofore asked him. He also refused to answer some additional question (R. 21–26). He was brought before the court and his counsel was given access to the transcripts of the grand jury interrogations (R. 28–30). On August 18, 1959, petitioner (with his counsel) appeared pursuant to an order to show cause why he should not be held in contempt for refusing to answer the questions "propounded to him on the 10th day of August, 1959, which the Court had ordered him to answer" (R. 32–33). Petitioner offered as the "real basis" of his disobedience the danger to himself and to his family if he disclosed his associates in the narcotics traffic. He rejected further opportunities offered him by the court to purge himself of the contempt by testifying (R. 39, 41–44, 47).

ARGUMENT

1. Petitioner was directed by the district court to answer questions before the grand jury, pursuant to statutory grant of immunity under 18 U.S.C. 1406, *supra*, pp. 2–3.[2] The statute provides, in broad terms, that a witness required to testify after a claim of self-incrimination shall not be prosecuted or penalized

[2] Petitioner does not raise the issues of construction and of constitutionality pending before this Court in *Reina* v. *United States*, No. 664, October Term, 1959; certiorari granted, 362 U.S. 939.

for or on account of "any" transaction, matter, or thing concerning which he is compelled to testify. Petitioner's claim that he was not adequately apprised of his duty to answer is wholly unsupported.

No confusion as to the duty to answer was indicated either by petitioner or by his attorney in the district court, when clarification, if truly necessary, could have been made. Even as late as the contempt hearing, petitioner's counsel asserted that the reason for petitioner's refusal to answer was, not confusion, but petitioner's fear that he might endanger his life and his family by telling what he knew of the narcotics traffic (R. 39, 43). While it is true, as petitioner argues, that his giving of this concededly invalid excuse would not void sound additional bases for refusal to answer if such bases existed, the failure of petitioner seasonably to indicate any lack of understanding is persuasive that there was actually no such confusion.

Petitioner argues that confusion must have arisen from the fact that government counsel and the court made divergent utterances as to whether petitioner could assert the privilege against incrimination with respect to questions concerning narcotics sales for which he had already been convicted. But these statements of counsel and court were preliminary and tentative.[1] Before the statutory immunity was actu-

[1] Government counsel, at one time prior to the court's order, thought that petitioner had no privilege with respect to questions as to where he obtained the narcotics for which he had already been convicted, and at another time thought the reverse. The court, without making a ruling, merely suggested "doubt" that there would be privilege with respect to such questions (R. 17–18).

ally invoked, it was conceded that petitioner had a valid claim of privilege (R. 16). This finding that the privilege had properly been claimed was expressly embodied in the court's formal order (R. 14).

Petitioner had ample opportunity to consult with counsel. At the outset of his interrogation before the grand jury, he stated that he had seen his lawyer and had told the lawyer that he would invoke the Fifth Amendment as to all questions (R. 5–6, 19–20). After the first appearance before the grand jury, when the government presented its petition to the district court for an order directing petitioner to answer questions pursuant to statutory immunity, petitioner asked and was granted leave to consult with his attorney.[2] The grand jury was directed not to resume its interrogation until petitioner had had an opportunity to consult with counsel (R. 19–20). After petitioner's second refusal to answer questions, petitioner's attorney obtained a continuance for study of the transcripts.[3] Thus, there was full opportunity for petitioner or his counsel to seek clarification, if there was really any doubt as to the scope of the immunity being accorded under the statute.

Similarly groundless is petitioner's allusion to the informal language of government counsel before the

[2] The trial judge's remark "That is right", was not directed, as petitioner asserts (R. 35), to a remark of petitioner's counsel that petitioner had not had counsel. Counsel did so state but continued with the remark that he was called and appeared before the court on the 14th of August and was then authorized to examine the transcripts of petitioner's interrogation. The judge's agreement appears directed only to the latter portion of counsel's remarks, being the only portion of which the court had knowledge.

grand jury that the judge "granted you [petitioner] immunity and ordered you to answer questions propounded to you before this Grand Jury concerning narcotics" (R. 21). Petitioner contends that this reference "restricted petitioner's immunity to narcotics" and thus barred questions "unrelated to narcotics," such as those relating to marihuana (Pet. 11). Aside from the obvious fact that, in common parlance, marihuana is classified as a narcotic, the complete answer is that the informal remark of government counsel could not narrow, and was not intended to narrow, the broad direction to answer which was ordered by the judge. In fact, petitioner had refused to answer a question relating to marihuana in his earlier appearance before the grand jury (R. 6) and this question had been one of those presented to the judge when the government asked that petitioner be ordered to answer (R. 18). The court's orders and the statute both dissipate any doubt of immunity in this respect and, as we have emphasized, petitioner and his counsel expressed no doubt as to the scope of the immunity, either at the contempt hearing or before.

2. Petitioner also contends that the judge's oral order directing him to testify was void, because the judge stated that "this court now grants you immunity from prosecution" (R. 18). Congress, of course, not the judge, actually "grants" the immunity. The quoted remark was, however, merely part of an informal explanation to petitioner which, in full context, could neither be misconstrued nor serve to invalidate the order. The judge commenced his remarks with a reference to the petition of the United States

Attorney, stating, "I find the petition in proper form. The same is granted" (R. 18). The petition made specific reference to 18 U.S.C. 1406 (*supra*, pp. 2–3) and merely asked that the court direct petitioner to answer. Moreover, the judge continued (R. 18–19):

> And in accordance with the provisions of the Narcotic Control Act, this Court now grants you immunity from prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation.
>
> It, therefore, is no longer necessary for you to invoke the protection of the Fifth Amendment to protect yourself from incrimination or subsequent prosecution, because pursuant to the provisions of the Narcotic Control Act, I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury.
>
> Do you understand the order of the Court?
>
> Mr. PIEMONTE. Yes, sir, your Honor.

In these circumstances, there could be no doubt that the immunity conferred was that pursuant to the statute. Petitioner was clearly not misled in any material way.

The written order contains no reference to any grant of immunity by the judge himself (R. 14–15), and that order would, of course, be controlling as against the informal oral explanations by the judge. *United States* v. *Hark*, 320 U.S. 531, 534–535; *Hill* v. *Wampler*, 298 U.S. 460, 464. Petitioner suggests, without so stating, that neither he nor his attorney saw the written order (Pet. 15), pointing out that the

written order does not bear the date stamp of the clerk (Pet. 15). The docket entry (R. 1), however, reads "8-13-59 Enter order directing Armondo Piemonte to answer certain questions before Grand Jury—Draft—Campbell, J." Furthermore, on August 13, 1959, Judge Campbell deferred further grand jury questioning so that petitioner would have full opportunity to confer with his attorney (R. 19). There was no barrier to examination of the written order by petitioner's attorney, for, as distinguished from other grand jury documents, the docket entries do not include that order among the matters "Suppressed & Impounded" (R. 1).

3. Petitioner challenges the written order on the ground that the court failed to make findings that the allegations in the petition were true, *i.e.*, that the grand jury was investigating certain federal narcotics law violations and that petitioner's testimony was in the public interest (Pet. 18). The court, under the immunity procedure, is not required to go behind the determination of the Attorney General and the United States Attorney that the witness' testimony is in the public interest. *Ullmann* v. *United States*, 350 U.S. 422, 434;[5] *United States* v. *Fitzgerald*, 235 F. 2d 453 (C.A. 2), certiorari denied, 352 U.S. 842. And see *In re McElrath*, 248 F. 2d 612, 617 (C.A.D.C.):

> The discretion of the District Court is limited at this stage to a determination of the procedural regularity of an application * * *.

[5] See the unavailing contention similar to that of petitioner in *Ullmann* v. *United States*, *supra*, No. 58, October Term 1955, Pet. Br. 59.

Petitioner's further contention, that the written order narrows the immunity to only a portion of the testimony (Pet. 18), is likewise without basis. The order relates to any question asked petitioner "relative to the aforementioned inquiry of said Grand Jury" (R. 15), *i.e.*, the inquiry then being conducted by that particular grand jury. In any event, the broad language of the immunity statute assures the immunity once the witness has been ordered to and does answer.

4. Petitioner alludes to the fact that upon his return to the grand jury on August 13, 1959, he was asked some questions not asked in his prior appearance. But these questions were not involved in the order to show cause with respect to criminal contempt, which related to "questions propounded to him on the 10th day of August, 1959 [the date of the first appearance], which the Court had ordered him to answer" (R. 33). In addition, we submit that when petitioner, after having been granted immunity, nevertheless defied the direction to answer the earlier questions, there was neither public interest nor duty on the part of the government to seek a further order with respect to immunity. The original order, as we have noted, was broad enough to cover all questions asked by that grand jury in the course of that particular inquiry.

Finally, there is no pertinence in petitioner's reference to the fact that the grand jury subsequently indicted him as a participant in a narcotics conspiracy. The statutory immunity is granted with respect to facts relating to testimony *given* under court order, and not with respect to facts as to which testimony is *withheld* in defiance of the order (*supra*, pp. 3, 5–6).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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